

1985

Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered

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Gershel, Michael A. (1985) "Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered," *William Mitchell Law Review*: Vol. 11: Iss. 1, Article 3.
Available at: <http://open.mitchellhamline.edu/wmlr/vol11/iss1/3>

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EVALUATING A PROPOSED CIVIL RIGHTS APPROACH TO PORNOGRAPHY: LEGAL ANALYSIS AS IF WOMEN MATTERED

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I. INTRODUCTION

The first amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .”¹ The free speech clause is written in absolute terms.² Two centuries of federal jurisprudence, however,

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The author wishes to thank the Pornography Resource Center, Minneapolis, Minnesota, for access to its research materials, and his close friends for their guidance, patience, and support.

1. U.S. CONST. amend. I. The fourteenth amendment, U.S. CONST. amend. XIV, extends this right to the states and their subdivisions. *Miller v. California*, 413 U.S. 15, 20 (1973); *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

2. The first amendment states that “no law” shall be made “abridging the freedom of speech.” U.S. CONST. amend. I. It does not, by its terms, admit to any exception to this

have made clear that not all communications are constitutionally protected from state action.³ The precise scope of the first amendment has recently become an issue of great importance in the city of Minneapolis. Since October 1983, the city has been wrestling with various possible approaches to coping with pornography. The city's most recent regulatory endeavor, a zoning law⁴ aimed at dispersing adult theaters, adult bookstores, rap parlors,⁵ saunas, and massage parlors, was struck down as unconstitutional.⁶ In response, the city considered alternative measures aimed at dealing with pornography.

The most novel approach being considered, and that receiving the most attention in the media⁷ and in public debate,⁸ is a proposed ordinance in the form of an amendment to the Minneapolis

proscription. It thus lends itself to a literalist, absolutist interpretation, such as that adopted by Supreme Court Justices Hugo Black and William Douglas. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 356 (1974) (Douglas, J., dissenting); *Konigsberg v. State Bar of California*, 366 U.S. 36, 60-61 (1961) (Black, J., dissenting). This view is not presently held by any Justice of the United States Supreme Court.

3. See *Roth v. United States*, 354 U.S. 476, 483 (1957); *infra* notes 83-91 and accompanying text (listing regulable types of communication). The Court in *Roth* noted that, in light of the history of state guarantees of free speech at the time of the ratification of the Constitution, "it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Roth*, 354 U.S. at 482-83.

4. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 540.410 (1977) [the Minneapolis Code of Ordinances will hereinafter be cited as MCO].

5. Rap parlors are establishments where an unclad woman converses with a patron with the objective of sexually arousing him.

6. *Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983). See generally Case Note, *First Amendment Overrides Municipal Attempt to Zone Adult Bookstores and Theaters—Alexander v. City of Minneapolis*, 698 F.2d 936 (8th Cir. 1983), 10 WM. MITCHELL L. REV. 331 (1984). The Minneapolis ordinance was similar to the Detroit zoning ordinance upheld in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). Unlike the law involved in *Young*, however, the Minneapolis ordinance affected existing operations, would have substantially curtailed the number of operations that could remain in business, and would have made it virtually impossible for new operations to enter the market. See *Alexander*, 698 F.2d at 938.

In *Alexander*, the ordinance was challenged only with respect to bookstores and theaters. It was not declared unconstitutional with respect to its regulation of rap parlors, massage parlors, or saunas. *Id.* at 936 n.2.

A new zoning ordinance, amending MCO § 540.410(b)-(c), was signed into law by Mayor Fraser on December 22, 1983. It requires that all adult bookstores and adult theaters that go into operation after enactment of the ordinance may do business only in a specified area in downtown Minneapolis. *Id.* § 540.410(c)(1). Existing theaters and bookstores are exempted from this location requirement. *Id.* Massage parlors, rap parlors, and saunas remain subject to the dispersal requirements that were voided in *Alexander* with respect to bookstores and theaters. *Id.* § 540.410(c)(2).

7. See, e.g., N.Y. Times, Jan. 6, 1984, at A11, col. 1; Will, *Rights v. Smut in Minneapolis*, Washington Post, Jan. 8, 1984, at C7, col. 2. Both the Minneapolis Star & Tribune (Minneapolis's only daily newspaper) and other area news journals provided a steady diet of

Civil Rights Code. The proposed ordinance would recognize pornography as a violation of women's civil rights.⁹ The proposed ordinance was drafted by University of Minnesota law professor Catharine MacKinnon and feminist author Andrea Dworkin. It was considered and passed by the City Council in late 1983¹⁰ and

news articles, editorials, and letters on the proposed ordinance throughout late 1983 and into 1984.

8. See, e.g., *Symposium: Pornography and the Constitution*, HENNEPIN LAW., Mar.-Apr. 1984, at 8. This symposium presented various viewpoints on the regulation of pornography. Since November 1983, both proponents and opponents of the civil rights approach to pornography have regularly appeared at symposia, community meetings, and debates throughout the Minneapolis metropolitan area to present their views.

The MacKinnon/Dworkin draft has fueled not only debate but action as well. Several other municipalities have been considering adoption of a civil rights approach to pornography. On April 23, 1984, the City Council of Indianapolis passed a modified version of the MacKinnon/Dworkin draft. Indianapolis Mayor William Hudnut III signed the bill into law on May 1. The ordinance, amended on June 15, 1984, provides for regulation of pornography under Indianapolis's Human Relations and Equal Opportunity Law. Plaintiff's Second Amended Complaint at 1, *American Booksellers Ass'n v. Hudnut*, No. IP 84-791C (S.D. Ind. 1984) (on file at William Mitchell Law Review office).

9. Ordinance to amend MCO Title 7, chs. 139, 141 (1982) (passed Dec. 30, 1983; vetoed Jan. 5, 1984) [hereinafter cited as Proposed Ordinance]. The full text of the proposed ordinance is reprinted in the Appendix to these Articles. See *Appendix: The MacKinnon/Dworkin Pornography Ordinance*, 11 WM. MITCHELL L. REV. 119 (1985). The possibility of a civil rights approach to regulating pornography was first raised on October 18, 1983. The Zoning and Planning Committee of the Minneapolis City Council met on that date to receive community input on the zoning of adult bookstores and theaters.

Among those in attendance at the Committee meeting were Catharine MacKinnon, Associate Professor at the University of Minnesota Law School, and Andrea Dworkin, a feminist writer who at the time was a Visiting Professor at the University of Minnesota. Dworkin and MacKinnon challenged the assumption that pornography merchants had a right to do business *anywhere* in the city. They saw pornography as a violation of the civil rights of women and argued that it should be treated as such. *Hearing of the City of Minneapolis Zoning Commission*, Oct. 18, 1983 (testimony of Andrea Dworkin). The City Council contracted with Dworkin and MacKinnon to draft an ordinance that would effectively regulate pornography. Dworkin and MacKinnon returned with a proposed amendment to the Minneapolis Civil Rights Ordinance, MCO chs. 139, 141. The amendment declared pornography to be a violation of the civil rights of women, and permitted a person to bring a civil claim for injuries caused by pornography. See *infra* notes 18-44 and accompanying text. The original draft was identical in all essential respects to the draft reintroduced in the City Council in 1984. This paper specifically addresses the 1983 draft ordinance. It is this draft which is reprinted in the Appendix to these Articles. See *Appendix, supra*.

10. The MacKinnon/Dworkin proposed ordinance was introduced in the City Council on November 23, 1983. On December 12 and 13, the Government Operations Committee held public hearings on the proposed amendment. *Minneapolis Star & Trib.*, Dec. 13, 1983, at 1B, col. 3. The Committee reported the amendment favorably on December 22, by a vote of five to zero. The Council passed the amendment on December 30 by a vote of seven to six. *Minneapolis, Minn.*, City Council Official Proceedings, Dec. 30, 1983, at 1998-99 [hereinafter cited as Official Proceedings].

vetoed by Mayor Donald M. Fraser in January of 1984.¹¹ Both a second MacKinnon/Dworkin draft¹² and a narrower amendment recommended by the Minneapolis Task Force on Pornography were introduced in the City Council in 1984.¹³

The innovative civil rights approach¹⁴ of the MacKin-

11. The Mayor vetoed the amendment on January 5, 1984. *Minneapolis Star & Trib.*, Jan. 6, 1984, at 1A, col. 1. On January 13, 1984, the Council tried to override the veto, which required nine votes. The veto override attempt was defeated by a vote of five to eight. *Official Proceedings*, Jan. 13, 1984, at 29. The failure to obtain even seven votes in favor of the override was partially attributable to the fact that five of the 13 council members were replaced in January 1984 as a result of recent elections.

12. A slightly altered version of the MacKinnon/Dworkin proposed ordinance was reintroduced in the City Council on January 13, 1984, and was co-sponsored by four of the 13 council members. *Official Proceedings*, Jan. 13, 1984, at 30.

13. In January, 1984, Mayor Fraser created the Minneapolis Task Force on Pornography. *Final Report, City of Minneapolis Task Force on Pornography*, App. I [hereinafter cited as Task Force Report]. In addition to considering the MacKinnon/Dworkin proposed ordinance, the Task Force considered several other proposed amendments to the Minneapolis Civil Rights Code to deal with pornography.

The Task Force was an ad hoc group which met from February through May of 1984. Task Force Report, *supra*, at 3. It consisted of eight people: three council members; two members of the Minneapolis Civil Rights Commission (which is empowered to enforce the city's civil rights ordinance); a member of the City Library Board; a member of the City Arts Council; and a representative of the Mayor's office. *Id.* The Task Force recommended its own civil rights amendment which was considerably narrower than the MacKinnon/Dworkin version. *Minneapolis Star & Trib.*, May 2, 1984, at 4B, col. 5. Several aspects of the Task Force recommendation are noted *infra* notes 14, 27-29.

The City Council did not vote on the 1984 MacKinnon/Dworkin ordinance. Instead, it substituted a compromise draft containing a narrower definition of pornography. Also, the trafficking provision was restricted to pornography that contained explicit depictions of force or violence against women.

The compromise version was recommended by the Council Government Operations Committee on June 20, 1984. The full City Council passed it on July 13 by a vote of seven to six, but Mayor Fraser vetoed it the same day. *Fraser's Veto Kills Antiporn Ordinance*, *Minneapolis Star & Trib.*, July 14, 1984, at 1A, col. 5. A seven to five vote on July 27 in favor of the compromise version was not enough to override the veto. *Council Sustains Veto of Porn Ordinance*, *Minneapolis Star & Trib.*, July 28, 1984, at 1A, col. 5.

14. The MacKinnon/Dworkin proposed ordinance and its subsequent permutations incorporate a civil rights approach to pornography in several ways. First, they explicitly recognize that pornography violates the civil rights of women. See *infra* note 21 (text of special findings in the proposed ordinance). The amendment recommended by the Minneapolis Task Force on Pornography contains a similar statement recognizing pornography as a violation of women's civil rights. Like many municipal, state, and federal civil rights laws, these draft amendments seek to protect and promote the rights of a discrete and identifiable subgroup of the general population.

Second, these draft amendments are regarded as civil rights measures because they would amend the civil rights code of Minneapolis. Unlike obscenity laws, which are presently regarded as the primary legal weapon available for coping with pornography, these amendments provide a civil rather than a criminal sanction. Compare MCO § 385.130 (criminal obscenity law) with MCO § 139.10-.50, 141.10-.100 (civil rights and remedies for discrimination). Moreover, the enforcement mechanism for remedying discrimination

non/Dworkin draft raises novel constitutional questions. The definition of pornography contained in the proposed ordinance¹⁵ is broader than the constitutional definition of obscenity.¹⁶ When the definition is read in conjunction with a provision forbidding trafficking in pornography,¹⁷ the net effect is that one may incur civil liability for selling or distributing material that has previously been assumed to be constitutionally protected. The proposed ordinance is therefore susceptible to a constitutional challenge on the ground that it violates the free speech provision of the first amendment.

This Article addresses the constitutionality of the MacKinnon/Dworkin proposed ordinance and argues for the legality of the civil rights approach. The Article does not propose that the courts expand or modify the well-established obscenity exception to the first amendment. Instead, it proposes that the courts carve out a new exception to protected speech, an exception based on the concept of pornography as a violation of women's civil rights. The Article first discusses the content of the proposed ordinance, focusing on its definition of pornography and its operative provisions. The Article then discusses the proposed ordinance in light of current first amendment doctrine. It sets forth the proper framework within which the constitutionality of the proposed ordinance should be analyzed. The Article then compares the proposed civil rights exception with the recognized exceptions to first amendment protection and discusses whether the courts are likely to recognize it as an exception unto itself.

II. OVERVIEW OF THE PROPOSED ORDINANCE

The MacKinnon/Dworkin proposed ordinance would amend the Minneapolis Civil Rights Code¹⁸ to redefine discrimination to

through pornography would be the same as for remedying other forms of discrimination proscribed in the civil rights code.

For a discussion of enforcement mechanisms provided in the Minneapolis Civil Rights Code, see *infra* notes 40-44 and accompanying text. Additional differences between obscenity law and the civil rights approach are discussed *infra* at notes 95-105, 191-94 and accompanying text.

15. The text of the pornography definition is discussed *infra* notes 24-30 and accompanying text.

16. For a discussion of the difference between obscenity as defined by the Supreme Court and pornography as defined in the proposed ordinance, see *infra* notes 92-105 and accompanying text.

17. Proposed Ordinance § 4, to add MCO § 139.40(I).

18. MCO chs. 139, 141.

include pornography¹⁹ and prohibit that discrimination in certain contexts.²⁰ The proposed ordinance includes findings of fact which identify the harms caused by pornography.²¹ For purposes of free speech analysis, the most important provisions of the ordinance are its definition of pornography²² and its operative provisions.²³

The proposed ordinance defines pornography as "the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following"²⁴ depictions:

- (i) women are presented dehumanized as sexual objects, things or commodities; or
- (ii) women are presented as sexual objects who enjoy pain or humiliation; or
- (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
- (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
- (v) women are presented in postures of sexual submission or sexual servility, including by inviting penetration; or
- (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or
- (vii) women are presented as whores by nature; or
- (viii) women are presented being penetrated by objects or animals; or
- (ix) women are presented in scenarios of degradation, injury,

19. Proposed Ordinance § 1, to amend MCO §§ 139.10(a), (b).

20. *Id.* § 4, to add MCO §§ 139.40(l)-(o).

21. *Id.* § 1, to add MCO § 139.10(a)(1). This provision states:

SPECIAL FINDINGS ON PORNOGRAPHY: The Council finds that pornography is central in creating and maintaining the civil inequality of the sexes. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, property rights, public accommodations and public services; create public harassment and private denigration; promote injury and degradation such as rape, battery and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women from full exercise of citizenship and participation in public life, including in neighborhoods; damage relations between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the constitutions and laws of the United States and the State of Minnesota.

Id.

22. *Id.* § 3, to add MCO § 139.20(gg).

23. *Id.* § 4, to add MCO §§ 139.40(l)-(o).

24. *Id.* § 3, to add MCO § 139.20(gg)(1).

torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.²⁵

The definition of pornography thus consists of four elements. Material does not constitute pornography unless it (a) is sexually explicit; (b) is a graphic depiction; (c) subordinates women; and (d) includes one of the nine particular depictions of women set forth in the ordinance.²⁶ Though pornography is defined in terms of women, material also constitutes pornography if men, children, or transsexuals are used in place of women.²⁷ The ordinance does

25. *Id.* § 3, to add MCO § 139.20(gg)(1)(i)-(ix). The ordinance does not contain a scienter requirement. Instead, the ordinance provides that it is not a defense to liability "that the defendant did not know or intend that the materials were pornography or sex discrimination." *Id.* § 4, to add MCO § 139.40(p).

The obscenity doctrine contains a constitutional scienter requirement. One cannot be liable for trafficking in obscene materials unless he knew the nature or the contents of the material. *Hamling v. United States*, 418 U.S. 87, 123 (1974); *Smith v. California*, 361 U.S. 147, 152-55 (1959). Given the Court's strong aversion to the imposition of strict liability for communications, *see New York v. Ferber*, 458 U.S. 747, 765 (1982) (scienter requirement for trafficking in child pornography); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (negligence requirement for defamation), it would probably require scienter for pornography regulation. If so, a court could simply read the scienter requirement into the ordinance. The scienter requirement need not appear within the four corners of the statute. Many obscenity statutes do not explicitly set forth a scienter requirement. *See, e.g.*, 18 U.S.C. § 1461 (1982) (federal obscenity trafficking statute).

The "know or intend" provision contained in the ordinance is consistent with the constitutional scienter requirement set forth in *Hamling* and *Smith*. *Smith* requires that the defendant know what the material contains. 361 U.S. at 153. The Court does *not* require that he know or intend that it is obscene. *Hamling*, 418 U.S. at 123.

26. The ordinance does not expressly require that the material be "taken as a whole." This is a constitutional requirement under the obscenity doctrine. *See Miller v. California*, 413 U.S. 15, 24 (1973); *Roth v. United States*, 354 U.S. 476, 489-92 (1957). The purpose of this rule is to avoid the chilling effect that a line-by-line determination of obscenity would otherwise produce. In light of this purpose, the "taken as a whole" rule would presumably be required of a pornography regulation.

There appeared to be an understanding among supporters of the ordinance and members of the City Council that this requirement was implicit in the draft ordinance. The requirement was expressly written into the draft ordinance prior to its full consideration by the City Council in 1984, when the Government Operations Committee amended section three of the draft ordinance to read: "This [trafficking] section shall not be construed to make isolated passage(s) or isolated part(s) actionable."

27. Proposed Ordinance § 3, to add MCO § 139.20(gg)(2). During the debate on the MacKinnon/Dworkin proposed ordinance, concern was expressed about defining pornography in terms of women. Indeed, the draft recommended by the Task Force defined pornography in a manner similar to the MacKinnon/Dworkin proposed ordinance, but everywhere substituted "person" for "women." *See Task Force Report, supra* note 13, App. V, at 1. The Task Force apparently did so out of fear that a gender-specific definition might be unconstitutional.

The definition contained in the revised draft is not gender-specific. The use of men, transsexuals, and children in the specified depictions in place of women also constitutes pornography. Proposed Ordinance § 3, to add MCO § 139.20(gg)(2). Pornography is

not define the terms "sexually explicit,"²⁸ "subordination,"²⁹ or "graphically depicted."³⁰

The material encompassed in the definition may be the subject of a civil complaint when it is involved in the factual contexts set forth in the ordinance's four operative provisions. The first of these provisions prohibits coercing a person into taking part in the production of pornography.³¹ For instance, a woman could not be forced to be in a pornographic film. Liability extends to the coercing party, as well as to the seller, distributor, and exhibitor of the material.³² The second operative provision prohibits the production, sale, exhibition, or distribution of pornography.³³ This trafficking provision exempts public libraries, and public and private

pornography regardless of the gender of the individual portrayed. The drafters made specific mention of transsexuals to avoid any possible difficulties a court may have in deciding the status of transsexuals as men or women.

28. The version recommended by the Task Force includes a definition of "sexually explicit" as:

- (1) Actual or simulated sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex or between a person and animals; or
- (2) Uncovered exhibition of the breasts, genitals, pubic region, buttocks or anus of any person.

Task Force Report, *supra* note 13, App. II, at 2.

Note that this definition excludes some material that is generally understood as pornography, particularly material that is often regarded as especially hard-core or deviant. For instance, it will exclude depictions of bondage where the victim's breasts, crotch, and buttocks are covered by the binding material. It will exclude sadomasochistic depictions that display bruises and lash marks on the victim's thighs and back. It will also exclude depictions of urination or defecation on the victim's body or into the victim's mouth, where the victim is fully clothed.

29. The version recommended by the Task Force defines subordination as "the treatment of another as inferior; submissive to, or controlled by another; made subject or subservient to another." Task Force Report, *supra* note 13, App. II, at 2.

There is a small but highly significant element of ambiguity in this definition. The ambiguity concerns the meaning of the term "another." If that someone must appear in the picture, then this definition would drastically narrow the scope of the definition. A depiction of a single person could never be pornography, since a second person would not be present. Even if a second person were present, there would be no subordination if the model were being submissive to or controlled by another person who was not in the picture.

30. For a comparison of this definition of pornography with the constitutional definition of obscenity, see *infra* notes 92-105 and accompanying text. Note that offensiveness is not one of the elements of the definition. During the course of debate on the draft, it has occasionally been misconstrued as permitting a claim by any woman who finds material offensive. Neither the definition of pornography nor its underlying policy rationale have anything to do with offensiveness. Whether or not material is offensive, it constitutes pornography only if it meets the four requirements set forth in the definition.

31. Proposed Ordinance § 4, to add MCO § 139.40(m).

32. *Id.*

33. *Id.*, to add MCO § 139.40(l). The most notable difference between the MacKin-

university and college libraries, from its scope.³⁴ The third provision provides a cause of action for a person who has pornography forced upon her in a place of employment, education, public accommodation, or at home.³⁵ Liability here is limited to the person who forced the material upon the complainant and to the institution where it occurred.³⁶

The final operative provision provides damages for someone who is "assaulted, physically attacked or injured in a way that is directly caused by specific pornography."³⁷ A victim may bring a complaint against the perpetrator or against the maker, distributor, seller, or exhibitor of the pornography.³⁸ On finding that an assault was caused by a specific piece of pornography, a court may enjoin the further exhibition, distribution, or sale of the pornography.³⁹

non/Dworkin proposal and the draft recommended by the Task Force is the latter's lack of a trafficking provision.

34. *Id.*, to add MCO § 139.40(l)(1).

The library exclusion is constitutionally suspect. In *City of Duluth v. Sarette*, 283 N.W.2d 533 (Minn. 1979), the Minnesota Supreme Court invalidated a city obscenity ordinance provision that exempted schools, churches, medical clinics, physicians, governmental agencies and others. The material involved was not otherwise entitled to constitutional protection and the city clearly intended to regulate it. The court therefore severed and invalidated the exemption rather than invalidating the ordinance as a whole. *Id.* at 537.

The library exemption contained in the ordinance is distinguishable from the Duluth provision at issue in *Sarette*. Whereas the Duluth exemption gave special treatment to certain people by exempting those people and institutions to which they have access, the proposed ordinance exemption does not draw so sharp a line. Public libraries and public university libraries are open to all. A finding of unconstitutionality would likely be due to the inclusion of private university libraries within the exemption. If the exemption is declared unconstitutional and the court determines that pornography is regulable, the court could sever and void the exemption for the reasons stated in *Sarette*.

35. Proposed Ordinance § 4, to add MCO § 139.40(n).

36. *Id.*

37. *Id.*, to add MCO § 139.40(o).

38. *Id.* It is important to underscore the point that, as with the other operative provisions, the assault provision is dependent on the pornography definition. Both pornography and the assault due to pornography must be present. *See id.* If an assault is triggered by sexually explicit material, assault does not make that material pornography. *See generally* *Olivia N. v. National Broadcasting Co., Inc.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981), *cert. denied*, 458 U.S. 1108 (1982). In *Olivia N.*, a rape with a bottle was patterned after a prime-time television show. Unless the television show were held to be pornography within the ordinance's definition, the rape in *Olivia N.* would not be actionable under the proposed ordinance.

In this respect, the pornography definition is more objective than obscenity law. Under the obscenity doctrine, the determination of whether material is obscene can turn on who is viewing the material. *See infra* notes 95-105.

39. Proposed Ordinance § 4, to add MCO § 139.40(o). Pornography complaints would follow procedures similar to other civil rights complaints under MCO chapter 141.

All complaints of discrimination by pornography are to be made to the Minneapolis Civil Rights Commission,⁴⁰ which is charged with investigating and adjudicating all complaints of discrimination.⁴¹ The Commission itself has no enforcement powers.⁴² Its decisions are enforceable by court order.⁴³ Decisions of the Commission are reviewable by the district courts upon application by either party.⁴⁴

III. THE ANALYTICAL FRAMEWORK

As a content-based regulation, the proposed ordinance raises serious constitutional questions. The ordinance has been challenged as violative of the first amendment.⁴⁵ Opponents of the ordinance argue that it is vague, overbroad, and a regulation of protected speech.

A constitutional analysis of the proposed ordinance requires more than a comparison of the scope of the proposed ordinance with the scope of the recognized exceptions to the first amendment. It is not enough, for instance, to assert that the amendment is unconstitutional because its definition of pornography is broader than the constitutional definition of obscenity.⁴⁶ The ordinance must be measured against both the general dimensions of the free speech provision and the rules of law and doctrines that it has spawned.

Over the years, the United States Supreme Court has carved out certain exceptions to protected speech.⁴⁷ The Supreme Court has

40. MCO § 141.50. It is the author's view that very few complaints brought under the assault provision are likely to be successful. A claimant must show both that the assailant consumed pornography and that that particular piece of pornography triggered the assault. Unless the pornography is present during the assault and the assailant is viewing the material in the course of his actions, one or both of these elements will be very difficult to prove.

41. *Id.* § 141.40(6)-(7).

42. *Id.* § 141.60(c).

43. *Id.*

44. *Id.* § 141.60(b).

45. *See Head of State MCLU asks Fraser to veto pornography law*, Minneapolis Star & Trib., Jan. 2, 1984, at 1B, col. 1.

46. The current constitutional definition of obscenity was announced in *Miller v. California*, 413 U.S. 15 (1973). The *Miller* definition is set forth *infra* at note 94 and accompanying text.

47. U.S. CONST. amend. I. States may limit the time, place, and manner of speech. *E.g.*, *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dep't of Chicago v. Mosely*, 408 U.S. 92 (1972); *Cox v. Louisiana*, 379 U.S. 559 (1965). The power to regulate speech by time, place, and manner restrictions is not pertinent to the scope of this Article. *See generally* J.

denied constitutional protection to a form of communication whenever, in the view of the Court, the harm caused by the communication greatly outweighs its social value.⁴⁸ This requires the Court to balance the state interest sought to be protected with the harm of the communication.⁴⁹ Utilizing this approach, the Court

NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 973-88 (2d ed. 1983) [hereinafter cited as NOWAK].

The government may freely regulate certain sorts of behavior, though the behavior has a communicative dimension. Even Justice William Douglas, a noted first amendment absolutist, conceded this point:

Hitler and his Nazis showed how evil a conspiracy could be that was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense. For such a project would be more than the exercise of free speech. Like picketing, it would be free speech plus.

Beauharnais v. Illinois, 343 U.S. 250, 284 (1952) (Douglas, J., dissenting); see also Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (overturning breach of the peace conviction for wearing a jacket bearing the words "fuck the draft"); United States v. O'Brien, 391 U.S. 367, 377 (1968) (setting forth constitutional standard for regulation of expressive conduct).

48. See New York v. Ferber, 458 U.S. 747, 763-64 (1982); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights, 413 U.S. 376, 389 (1973); Roth v. United States, 354 U.S. 476, 484 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring), *rev'd*, 395 U.S. 444 (1969).

49. In *Ferber*, 458 U.S. 747, the Court upheld a law banning the use of children in the production of pornography. The Court balanced the state's compelling interest "in safeguarding the physical and psychological well-being of a minor," *id.* at 756-57 (citation omitted), against the de minimus value of permitting sexual performances by minors, *id.* at 762. The Court concluded that in the case of child pornography "it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests . . . at stake" that the entire class of communication is regulable and "no process of case-by-case adjudication is required." *Id.* at 763-64.

In *Pittsburgh Press Co.*, 413 U.S. 376, the Court upheld a ban on a newspaper's listing employment opportunities under headings designating preference by sex. The Court recognized the legitimate state interest in forbidding practices that foster sex discrimination in employment. *Id.* at 383-89. On the other hand, the restriction was not made for the "purpose of muzzling or curbing the press" and did not impair the paper's "financial viability" or "its ability to publish and distribute its newspapers." *Id.* at 383. On balance, the state interest in the regulation outweighed the first amendment interests involved. 413 U.S. at 389.

In *Roth*, 354 U.S. 476, the Court held that obscene materials may be regulated. The regulation at issue furthered a state interest in order and morality by regulating material that was "utterly without redeeming social importance." *Id.* at 484-85.

In *Chaplinsky*, 315 U.S. 568, the Court held that states may proscribe the utterance of fighting words. Such terms are "no essential part of any exposition of ideas . . ." *Id.* at 572. Fighting words are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.*

This approach does not require a case-by-case determination of the scope of the first

has ruled that false defamatory statements,⁵⁰ fighting words,⁵¹ words creating a clear and present danger,⁵² obscenity,⁵³ and child pornography⁵⁴ are not protected speech.

This methodology of first amendment jurisprudence has important ramifications. First, the balancing approach reveals the essential nature of the first amendment. The free speech provision has spawned innumerable rules of law, but it is not itself a rule of law. It is a statement of policy.⁵⁵ As interpreted by the Court, a communication is constitutionally protected unless it would unduly frustrate a countervailing compelling state interest.

Second, determining whether a certain type of communication falls within one of the recognized exceptions to the definition of speech is the beginning, not the end, of free speech analysis. Even if a communication does not fit within a recognized exception it may be undeserving of constitutional protection if the harm of the speech sufficiently outweighs its value.⁵⁶

A law will also be held invalid if it is unduly vague or overbroad regardless of whether it addresses a harm that is sufficient to justify regulation of communication. Merely furthering an important state interest is insufficient to satisfy the requirements of the free speech provision. Legislation must be precisely drafted to limit its

amendment. The test balances the harms and value of entire classes of communication, not individual communications. See *Ferber*, 458 U.S. at 763-64.

50. *Beauharnais*, 343 U.S. at 256. The precise issue in *Beauharnais* was the constitutionality of a state statute regulating group libel. The Court upheld the statute. *Id.* at 266. Subsequent decisions of the Court have cast doubt on the continued validity of the *Beauharnais* holding. See *infra* note 120 and accompanying text. The broad supposition underlying *Beauharnais*, that false defamatory speech is not protected, remains true. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 133-36 (1979) (defamation claim reinstated where petitioner was held to be a private figure rather than a public figure).

51. *Chaplinsky*, 315 U.S. at 572.

52. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

53. *Roth*, 354 U.S. at 485.

54. *Ferber*, 458 U.S. at 756-64.

55. Chief Justice John Marshall wrote:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is a constitution we are expounding.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original).

56. See, e.g., *Ferber*, 458 U.S. at 760-61 (holding that child pornography is not constitutionally protected though it does not fall within the recognized obscenity exception to the first amendment).

reach to only the harm that it purports to address.⁵⁷

In light of these considerations, assessing the constitutionality of the proposed civil rights ordinance requires a three-step process. First, one should consider whether the material sought to be regulated falls within a recognized exception to the first amendment. If it does not, then it is necessary to assess whether the Court is likely to find that the harm of the communication sought to be regulated greatly outweighs its value. This second stage of the analysis is more complicated, requiring consideration of the harm, whether the same or similar harm has been recognized as constitutionally significant in other contexts, and an assessment of the social value of the material. Finally, the proposed ordinance must be evaluated for possible vagueness or overbreadth.

Much of the material to be regulated by the proposed ordinance does not fall within the scope of any of the recognized exceptions.⁵⁸ Nonetheless, it is possible that the Supreme Court, after balancing the state interest involved against the value of the communications involved, would hold that the communications covered by the ordinance may be regulated. It is also possible that the Court would find that the ordinance is neither vague nor overbroad, and is therefore constitutional.

IV. THE STATE INTEREST IN REGULATING PORNOGRAPHY

The political basis for the proposed ordinance is the harm that pornography causes to women.⁵⁹ The legal basis for denying such material constitutional protection is the state interest in combating that harm.⁶⁰

57. See *infra* notes 148-93 and accompanying text.

58. Some, but not all, of the material sought to be regulated by the proposed ordinance can already be regulated under the recognized obscenity exception to first amendment protection. Pornography and obscenity are entirely distinct concepts, however. See *infra* notes 92-105 and accompanying text (pornography distinguished from obscenity).

59. The civil rights approach to pornography embodied in the proposed ordinance is the first regulation of pornography that focuses on the harm to women. Previous approaches to pornography have sought to alleviate other perceived harms. Obscenity laws further "the social interest in order and morality." *Roth v. United States*, 354 U.S. 476, 485 (1957) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)). Zoning laws, which regulate the sale or exhibition of pornography, protect property values and neighborhood stability. See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 54-55 (1976). Laws restricting pornographic material to "adults only" areas are often intended to protect minors. See, e.g., MINN. STAT. § 617.291, subd. 2 (1982) (legislative purpose of statute regulating sale of pornography was to protect the "health, welfare and safety of . . . minors within the state").

60. The Supreme Court has acknowledged the harm of pornography outside of the

free speech context. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-61 (1973), the Court discussed the harm caused by pornography in the course of limiting the constitutional right to privacy.

The constitutional right to privacy protects personal rights that are regarded as fundamental, *Roe v. Wade*, 410 U.S. 113, 152 (1973), or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The precise textual basis has been a source of mild disagreement on the Court. Compare *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (Douglas, J., plurality) (right to privacy is a penumbra of the first, third, fourth, fifth, and ninth amendments), with *id.* at 486-87 (Goldberg, J., concurring) (right to privacy is implicit in the ninth amendment) and *id.* at 500 (Harlan, J., concurring) (right is implicit in the concept of ordered liberty protected by the due process clause of the fourteenth amendment). The source of the right to privacy is now generally regarded as emanating from the due process clause of the fifth and fourteenth amendments. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684 (1977); *Roe*, 410 U.S. at 153. The right protects personal privacy in actions and decisions regarding family and marriage. See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (statute requiring court approval of marriage of individual with children obligated to support held unconstitutional); *Roe*, 410 U.S. 113 (right to abortion); *Carey*, 431 U.S. at 678 (right of unmarried people to purchase and use contraceptives); *Loving v. Virginia*, 388 U.S. 1 (1967) (statute barring interracial marriage held unconstitutional); *Griswold*, 381 U.S. at 479 (right of married people to purchase and use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (voiding sterilization requirement for repeat criminal offenders); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to educate child at private school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to teach child a foreign language). The right to privacy also protects the right to read obscenity in one's own home. See *Stanley v. Georgia*, 394 U.S. 557 (1969).

In *Paris Adult Theatre I*, the Court dealt with obscene films that constituted hard-core pornography and would likely fall within the ordinance's definition of pornography. See 413 U.S. at 52. The State of Georgia urged that the material be denied constitutional protection, arguing that it had a "tendency to exert a corrupting and debasing impact leading to antisocial behavior." *Id.* at 63. The Court acknowledged that this concern was both legitimate and important, saying:

The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Id. at 63. The Court thus recognized that the state could regulate communication that had a substantial, harmful effect on the way people relate to each other. The Court ruled that material may be declared obscene and regulated even though it was being displayed to consenting adults in a movie theatre. In so ruling, the Court held that people had no constitutional right to publicly view any material they desired. *Id.* at 65-67; see also *United States v. Orito*, 413 U.S. 139 (1973) (Congress may prohibit shipment of obscene material by public or private carrier); *United States v. 12 200-Foot Reels of Super 8MM Film*, 413 U.S. 123 (1973) (Congress may bar the importation of obscene materials intended solely for personal use); *United States v. Reidel*, 402 U.S. 351 (1970) (Congress may ban use of mails for sending obscene materials to consenting adults); cf. *Stanley*, 394 U.S. 557 (one has a constitutional right to read obscene material in his own home).

In the case of pornography, the asserted harm is more clearly identified and is supported by a voluminous record of personal testimony and scientific data. See *infra* notes 75-77 and accompanying text. This solid empirical and theoretical basis may support the constitutionality of a broader regulation.

The harm of pornography is multi-faceted.⁶¹ First, pornography alters and distorts people's notions of sexuality. It alters our notions of consent and nonconsent to sexual activity. Pornography describes and defines sexuality.⁶² The theme is sexual arousal, whether or not the material actually depicts sexual activity between individuals. Pornography aims to arouse its audience, typically males, through depictions of dominance and violence.⁶³ It makes dominance over women and violence against women sexy and sexually fulfilling. It injects and integrates notions of domination and violence into the sphere of sexual activity.

Pornography usually depicts women enjoying their victimization.⁶⁴ Pornographic photography or drawings will often accompany articles stating that women enjoy being treated in a particular manner.⁶⁵ Some materials also serve as "how-to" guides. For example, there are bondage magazines that describe how to make escape-proof knots.⁶⁶

61. The discussion of pornography that follows is not expected to convince anyone of the seriousness of the pornography problem. The author intends only to set forth the general contours of the harm of pornography.

One cannot honestly or fairly consider the constitutional questions involved without an understanding of the material at issue. A full appreciation of pornography cannot be obtained without first-hand examination of the material. Readers are encouraged to examine pornography. Women, who generally have less contact with pornography in their daily lives than do men, are especially encouraged to examine this material.

The titles of pornographic material cited in this Article are intended to give the reader a sense of this material. They are actual publications available in the Minneapolis area. Many of the publications are on file with the Pornography Resource Center, Minneapolis, Minnesota. Others were gathered in a recent informal survey of the shelves of one of Minneapolis's most popular adult bookstores.

62. Proposed Ordinance § 3, to add MCO § 139.20(gg)(1) (definition of pornography). Pornography is the subordination of women through sexuality. Pornography creates a construct of sexuality and subordinates women through that construct. For more about the message of pornography and the dimensions of its social impact, see A. DWOR-KIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979); *TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY* (L. Lederer ed. 1981).

63. See, e.g., *Dirty Pool*, HUSTLER, Jan. 1983 (gang rape on pool table); *Belle of the Ball*, HUSTLER, May, 1978, at 82 (interracial gang rape by men in chains); *The Second Skin*, PENTHOUSE, Sept. 1980, at 130, 181 ("Bowling to his stronger will, we could not help but defer . . .").

64. See *ANAL BONUS 1* (undated); *ANYTHING GOES 1* (undated); *BOY ON GIRL 1* (1981); *Hayloft Harvest*, HUSTLER, May, 1979, at 40; *WILD FUCKING 1* (undated); *Cheating Bitch*, RED CHEEKS, Mar. 1979, at 1 (estranged husband returns home and beats wife).

65. See *supra* note 63.

66. See *Minneapolis City Council Government Operations Committee Public Hearings on Ordinances to Add Pornography As Discrimination Against Women*, Dec. 12-13, 1983 [hereinafter cited as *Hearings*] Session II, at 68. At the Minneapolis public hearings on the proposed ordinance, women testified about men acting out specific pieces of pornography. See *Hearings, supra*, Session II, at 63-64 (testimony of a private citizen) (husband persuaded wife to

One pervasive notion in pornography is that women are willing to submit to men's every sexual whim. Pornography assumes the consent of all women before any woman has been given the opportunity to grant her consent. As a seven billion dollar industry, the pornography industry is our society's largest source of information on sexual behavior.⁶⁷ Pornographers are the nearest thing to America's sex educators. The message they convey generally goes unchallenged. During the hearings on the ordinance in December 1983, numerous women described how they were sexually coerced and abused by men who "learned" from pornography.⁶⁸ Therapists and counselors who had worked with sex offenders described case histories in which the offender believed, because of pornography, that there was nothing wrong with what he was doing.⁶⁹ Por-

enact scenarios from pornographic magazines), Session III, at 23-24 (testimony of Wanda Richardson, Harriet Tubman Women's Shelter staff member) (two women shown X-rated movies and then forced to act out scenes at home; woman later hospitalized); Session III, at 29 (testimony of Donna Dunn, Women's Shelter, Inc., staff member) (woman forcibly stripped, bound, and gagged by husband, then raped by a German Shepard). Prostitutes are often encouraged to act out pornography by "johns" who will hand the prostitute an article or picture and tell her to perform it on him. *Id.*, Session II, at 721 (testimony of a former prostitute), Session III, at 76 (testimony of Sue Santa, Minneapolis Youth Division staff member). In addition, pimps sometimes use pornography as training manuals, showing it to their prostitutes to teach them how to perform various sexual acts. *Id.*, Session III, at 76 (testimony of Sue Santa) ("its like a mail order catalogue of sex acts, and that is what [the prostitute] is expected to perform").

67. M. Langelan, *The Political Economy of Pornography*, AEGIS, Autumn 1981, at 5. This figure was listed as a conservative estimate, with total U.S. sales probably closer to \$10-15 billion in 1981. The industry has grown rapidly during the past thirty years. *See id.* at 7-9. In light of this steady growth, combined with inflation over the past three years, the pornography industry may now have annual gross sales equal to or exceeding \$20 billion.

The pornography industry is as large or larger than the film and record industries combined. Cook, *The X-Rated Economy*, FORBES, Sept. 18, 1978, at 81. In 1981, Americans spent \$2.75 billion at motion picture theaters, INTERNATIONAL MOTION PICTURE ALMANAC 28A (R. Gertner ed. 1984), and consumed \$4.246 billion worth of phonograph records and tapes, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 237 (1984). In 1980, pornographic video cassettes outsold other video cassettes by three to one. Langelan, *supra*, at 8.

68. *See, e.g.*, Hearings, *supra* note 66, Session II, at 63-64 (testimony of a private citizen). In the many incidents discussed at the hearings, however, it was far more common for men to act out pornography on women without regard to whether they believed the women enjoyed it. *See, e.g., id.* Session III, at 47-48 (testimony of Cheryl Champion, Washington County Human Services, Inc., Sexual Abuse Unit) (two teenagers kidnapped and forced to act out pornography), Session II, at 74 (testimony of a former prostitute); *see also supra* note 66.

69. *See, e.g.*, Hearings, *supra* note 66, Session III, at 63-64 (testimony of Nancy Steele) (pornography used to justify molestation of a client's daughter); Session III, at 68 (testimony of Richelle Lee, State of Minnesota Department of Corrections) (pornography used to justify incest). Pornography's message as to acceptable sexual behavior influences the perpetrator as well as the victim. When men act out pornography, the pornography legiti-

nography creates and legitimizes the pornography consumer's notions of sexuality.

A second harm of pornography is the injury suffered by those involved in its production. The production of films, videos, and photographs requires the use of real people. Real women must pose and act out the roles that pornography creates.⁷⁰ Real women must be bound, bruised, cut, and in the case of "snuff" films, killed to produce pornography.⁷¹ Although it is argued that many women voluntarily take part in the production of pornography,⁷² many do not.⁷³ Some women are coerced or physically forced into making pornography.⁷⁴

A third harm of pornography is that it alters men's attitudes and behavior toward women. Pornography affects the way men

mizes their actions. It helps men to believe—or at least convince themselves—that what they are doing is right. *Id.* Pornography is also used to convince victims that it is socially proper to submit to acts they would otherwise resist. *See id.*, Session II, at 70-71 (testimony of a former prostitute); Session III, at 71 (testimony of Charlotte Kasl, therapist); Session III, at 79 (testimony of Sue Santa, Minneapolis Youth Division, Inc.).

70. *See* A. DWORKIN, *supra* note 62, at 201-02.

71. *See Two accused of murder in snuff film*, Oakland Trib., Aug. 6, 1983, at A-6, col. 1 (report of two teenage girls slain in the production of a pornographic film).

72. People may differ as to the degree to which they believe a woman may actually choose to participate in the making of pornography. There are those who believe that women are as free to exercise individual choices as men. There are others, however, who question the degree of freedom afforded to women and other oppressed groups in our society. The subordinate status of women, discussed *infra* note 81 and accompanying text, may circumscribe the free will of individual women, particularly with respect to choices involving the availability of their bodies. If so, traditional notions of free will are inapplicable to women.

73. Numerous witnesses at the ordinance hearings attested to forced participation. The testimony of Linda Marchiano, Hearings, *supra* note 66, Session I, at 45-57, formerly known as "Linda Lovelace," describes a brutal captivity that is not unique among women in the pornography industry. *See* L. LOVELACE, *ORDEAL* (1980). The results of a lie detector test taken by Ms. Marchiano regarding her imprisonment and physical abuse were also introduced into evidence at the hearings. Hearings, *supra* note 66, Session I, at 57.

Another woman at the hearings described how a male friend coerced her into acting in pornographic material. Though the incident occurred several years ago, she was still scarred by it. *Id.*, Session II, at 58-61 (testimony of a private citizen). A prostitute described how women new to the profession were pressured by their pimps into participating in pornography. The pornography was then used to blackmail them into continuing in prostitution. *Id.*, Session I, at 58-59 (letter from Dr. Kathleen Barry, author of *FEMALE SEXUAL SLAVERY* (1979)).

74. *See, e.g.*, L. LOVELACE, *supra* note 73; Hearings, *supra* note 66, Session III, at 77 (testimony of Sue Santa, Minneapolis Youth Division); Session II, at 81 (testimony of a former prostitute); Hearings, *supra* note 66, Session II, at 58-61 (testimony of a private citizen). It is unclear what proportion of women are emotionally coerced or physically forced into the making of pornography. The number of women who have detailed their own involuntary participation indicates that the number may be substantial.

think about women.⁷⁵ For example, men who view pornography develop more callous attitudes toward women.⁷⁶ Pornography also affects the way men act towards women. Pornography increases aggression toward women.⁷⁷ It makes men more likely to

75. Malamuth, *Rape Fantasies as a Function of Exposure to Violent-Sexual Stimuli*, 10 ARCHIVES OF SEXUAL BEHAVIOR 33 (1981); Malamuth & Check, *The Effects of Mass Media Exposure on Acceptance of Violence against Women: A Field Experiment*, 15 J. RESEARCH IN PERSONALITY 436 (1981).

76. Zillmann & Bryant, *Pornography, Sexual Callousness, and the Trivialization of Rape*, 32 J. COM. 10 (1982). Men who have viewed pornography are more likely to believe myths about rape (e.g. women enjoy rape). Malamuth & Check, *supra* note 75, at 436. Men who have viewed pornography are also less likely to empathize with a woman victimized by a sexual crime. Malamuth & Check, *Penile Tumescence and Perceptual Responses to Rape as a Function of the Victim's Perceived Reactions*, 10 J. APPLIED SOCIAL PSYCHOLOGY 528 (1980).

77. Donnerstein & Berkowitz, *Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women*, 41 J. PERSONALITY & SOC. PSYCHOLOGY 710 (1981); Donnerstein & Hallam, *The Facilitating Effects of Erotica on Aggression Against Women*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1270 (1978); Meyer, *The Effects of Sexually Arousing and Violent Films on Aggressive Behavior*, 8 J. SEX RESEARCH 324, 329 (1972).

In the Donnerstein & Berkowitz study, *supra*, males were provided with an opportunity to aggress against a female after viewing a rape scene where the victim reacted either positively or negatively to her victimization. The study found that the negative ending led to aggression against the woman only if the male was previously angered. The positive ending triggered aggression against the women no matter what the male's mental state. One of the authors to the study noted that pornography typically shows the woman enjoying her victimization. Donnerstein & Malamuth, *Pornography: Its Consequences On The Observer*, in SEXUAL DYNAMICS OF ANTI-SOCIAL BEHAVIOR 31, 38 (L. Schlesinger & E. Revitch eds. 1983) [hereinafter cited as *Consequences*]; accord Smith, *The Social Content of Pornography*, 26 J. COM. 16, 22 (1976). The results involving the positive ending are thus more pertinent to an examination of the effects of pornography.

In *Consequences*, *supra*, Professors Malamuth and Donnerstein collected studies showing that pornography lacking explicit violence led to both increases and decreases in male aggression. They reconcile these apparent conflicts by theorizing that nonviolent pornography will increase aggression in previously angered males, while nonviolent pornography triggering only "a low level of arousal" may decrease aggression by males not previously disposed to aggress. *Id.* at 33-35. If this is the case, then pornography will not promote physical harm to women provided that it does not possess explicitly violent content and is not consumed by males predisposed to aggress against females.

Pornography has become increasingly violent during the past thirty years. Lundberg, *On Pornography, Censorship and the Subordination of Women*, HENNEPIN LAW. Mar.-Apr. 1984, at 22 & n.1. According to one study, even *Playboy* and *Penthouse*, the American standard bearers of so-called soft-core porn, have become increasingly violent. Malamuth & Spinner, *A Longitudinal Content Analysis of Sexual Violence in the Best-Selling Erotic Magazines*, 16 J. SEX RESEARCH 226 (1980).

Malamuth and Donnerstein's statement that pornography may in some cases reduce aggression does not negate the harm of nonviolent pornography. Aggression against women is only one aspect of this harm. Nonviolent pornography also shapes male attitudes toward women. E.g., Zillmann & Bryant, *supra* note 76, at 10; Malamuth, Haber & Feshbach, *Testing Hypotheses Regarding Rape: Exposure to Sexual Violence, Sex Differences, and the "Normality" of Rapists*, 14 J. RESEARCH IN PERSONALITY 121 (1980). In addition to the studies cited here, studies are collected in PORNOGRAPHY AND SEXUAL AGGRESSION (N.

commit violent acts against women.⁷⁸

This third harm of pornography is different than the first harm discussed:⁷⁹ in addition to distorting notions of sexuality, pornography also alters men's attitudes and behavior toward women outside the sphere of sexual activity. It affects the way women are treated in all circumstances, under all conditions.⁸⁰ This harm of pornography is thus broader in scope than the first harm.

These three harms of pornography are exacerbated by the social condition of women. The existence of pornography does not merely inject an element of unfairness into an otherwise fair society. Rather, it tramples on the rights of a discrete class of people who already occupy a subordinate social status.⁸¹ Pornography fuels this inequality. It fuels discrimination and violence against wo-

Malamuth & E. Donnerstein eds. 1984), and Baldwin, *Pornography: Not Just a Fantasy*, HENNEPIN LAW. Mar.-Apr. 1984, at 9.

Research in this area has been conspicuously lacking in conflicting results. Hearings, *supra* note 66, Session I, at 44 (testimony of Dr. Edward Donnerstein). One oft-cited exception is the REPORT OF THE COMMISSION ON PORNOGRAPHY AND OBSCENITY (1970). The Commission's conclusion that pornography does not cause violence, REPORT, *supra*, at 139, has been widely criticized. See, e.g., Malamuth & Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, 15 ADVANCES IN EXPERIMENTAL PSYCHOLOGY 103 (1982). The Supreme Court has relied on the Commission's minority report indicating a connection between pornography and criminal behavior. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 n.8 (1973).

As with all social science research, application of laboratory findings to the outside world may be suspect. It is thus noteworthy that as laboratory conditions are made increasingly complex to simulate real life conditions, the harmful effects become clearer. Donnerstein, *Pornography: Its Effect on Violence Against Women*, in PORNOGRAPHY AND SEXUAL AGGRESSION (N. Malamuth & E. Donnerstein eds. 1984).

78. See *supra* note 77.

79. See *supra* notes 62-69 and accompanying text.

80. Inherent in the definition of pornography as the subordination of women through sexuality is the understanding that pornography depicts women only as sexual beings. Pornography eroticizes women in all their roles. Whether the woman is depicted in the workplace, at a social gathering, at home, or alone in a room, her essence is sexuality. *Playboy*, for example, is well-known for its thematic pictorials of women in college, in various occupations, and in the armed forces. See, e.g., *Beauty and Bureaucracy*, PLAYBOY, Nov. 1980, at 126 (female government employees in Washington, D.C.); *Girls of the Southwest Conference*, PLAYBOY, Sept. 1980, at 140 (female university students); *The Girls of the Office*, PLAYBOY, Aug. 1978, at 138 (secretarial workers); see also D. SCOTT, *BLOW HARD BABY-SITTER* (1984); *MILK MAID PARADE* (1984) (lactating women); *SWANK 6* (1984) (heralding the arrival of *Toilet Tarts*, a pornographic magazine that apparently focuses on women inserting and removing tampons).

Pornography also defines female sexuality in terms of particular body parts. Magazines such as *Big Boobs*, *Bottom*, *Busty Shavers*, *Foot World*, *Jiggs*, *Pantied Bottoms*, and *Shaved* need no explanation; see also *Moons in June*, PLAYBOY, June 1980, at 177.

81. Women are treated unfairly in the workplace. See C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). Women have traditionally been paid less for doing the same work as men. Cf. Equal Pay Act of 1963, Pub. L. No. 88-38, § 2, 77 Stat.

men.⁸² The state has an interest in eliminating and preventing the

56 (purpose of the Act to correct working conditions such as depressed wages that affect women employees' health and efficiency) (codified at 29 U.S.C. § 206(d) (1982)).

Women continue to be paid less than men for comparable work. Cf. MINN. STAT. § 43A.01, subd. 3 (1982)) (provides comparable pay for comparable work by state employees).

The income of women was 45% that of men in 1981. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 469 (104th ed. 1984) [hereinafter cited as STATISTICAL ABSTRACT]. Among workers with full-time employment, the mean income of women was 60.2% that of men. *Id.* In other words, a male with a full-time job earned on average 66% more than his female counterpart. This income inequality exists without regard to educational achievement. Over the course of her life, a woman age 35 or older with five or more years of college can expect to earn less money than a male high school graduate of the same age. *Id.* at 470.

Women are restricted from entry into more lucrative careers, including business and the professions. In 1981, women received only 31.3% of all masters degrees conferred in business management and administration. *Id.* at 169. They received only 32.8% of all Doctor of Medicine degrees conferred the same year. *Id.* at 170. As of 1982, women comprised 15.4% of lawyers. *Id.* at 419.

Women live in the shadow of violence. A large proportion of wives and female partners are battered. D. MARTIN, BATTERED WIVES (1983). The actual scope of wife battery is unclear, as no government statistics are maintained on it. Moreover, the criminal justice system has historically denied recourse and protection to battered women. See Paterson, *How the Legal System Responds to Battered Women*, in BATTERED WOMEN 79 (D. Moore ed. 1979); see also *Bruno v. Codd*, 47 N.Y.2d 582, 587, 393 N.E.2d 976, 978, 419 N.Y.S.2d 901, 903-04 (1979) (suit brought by twelve battered wives to compel police action on complaints dismissed for nonjusticiability). Battering is an underreported crime, as victims will often cover up the true cause of even serious injuries. D. MARTIN, *supra*, at 12-13.

Surveys and studies indicate that the problem is severe. Studies indicate that battering occurs in 16% to 49% of marriages. Straus, *A Sociological Perspective on the Causes of Family Violence*, in VIOLENCE AND THE FAMILY 7 (M. Green ed. 1980); D. RUSSELL, RAPE IN MARRIAGE 90 (1982); R. GELLES, THE VIOLENT HOME 50 (1974); Moore, *Editors's Introduction*, in BATTERED WOMEN, *supra*, at 14. It is estimated that well over one million wives are beaten each year. D. MARTIN, *supra*, at 13.

Several hundred thousand women annually are victims of rape. As with battering, accurate figures on the incidence of rape are difficult to obtain. In 1982, 77,800 forcible rapes were reported. STATISTICAL ABSTRACT, *supra*, at 175. Between 50-90% of all rapes are not reported. J. BODE, FIGHTING BACK 11-12 (1978); E. HILBERMAN, THE RAPE VICTIM 9 (1976). Bode estimates that 500,000 women are raped each year. The Criminal Justice Resource Center estimated that 191,739 rapes occurred in 1979, with 48% not reported to police. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1982 244, 293 (1983). Rape figures are also skewed by the fact that some rapes are protected by law. See Griffin, *In 44 States It's Legal to Rape Your Wife*, STUDENT LAW., Sept. 1980, at 20; Schulman, *The Marital Rape Exemption in the Criminal Law*, 14 CLEARINGHOUSE REV. 538 (1980). In a recent survey, 14% of women who were or had been married disclosed that they were the victims of rape or attempted rape by their husbands. D. RUSSELL, *supra*, at 57.

82. See *supra* notes 75-78. During the course of the public hearings, members of the therapeutic community who worked with batterers and sex offenders testified as to the central role of pornography in that violence. See Hearings, *supra* note 66, Session III, at 44-45 (testimony of Bill Seals, Director of Sexual Assault Services, Center for Behavior Therapy) (35 of 37 offenders surveyed said they sometimes consumed pornography prior to committing sexual assaults); Session III, at 50 (testimony of Cheryl Champion, Washington County Human Services, Inc., Sexual Abuse Project) (all offenders being treated were

harm caused by pornography. In light of the subordinate status of women, that state interest is compelling.

V. PORNOGRAPHY AND THE RECOGNIZED EXCEPTIONS TO THE FIRST AMENDMENT

Over the past eighty years, the United States Supreme Court has recognized various exceptions to the free speech clause of the first amendment. These exceptions are based on various factors, but they all exist because these types of communication pose dangers to society which greatly outweigh their worth.

Some communication is regulable because of the context in which it is made. The words themselves are constitutionally protected but they lose that protection if they are made in certain circumstances. Thus, fighting words,⁸³ and speech that presents a clear and present danger,⁸⁴ are not protected.

Regulation of communication may turn on its veracity. Thus, false defamatory statements may be regulated.⁸⁵ Statements that

pornography consumers "at a very early age"); Session III, at 63 (testimony of Nancy Steele) (offenders "generally will increase their consumption of pornography prior to sex offenses"); Session III, at 67 (testimony of Richelle Lee, State of Minnesota Department of Corrections) (has yet to work with an offender that did not use pornography); Session III, at 69 (testimony of Charlotte Kasl, therapist) (pornography is "an integral part of child abuse").

83. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). The term "fighting words" appears to indicate that the words themselves are not protected. The denial of protection, however, depends solely on the context in which the words are used; the words must be addressed to a particular person, *Cohen v. California*, 403 U.S. 15, 23 (1971) ("fuck the draft" written on jacket held not fighting words), and must "tend to incite an immediate breach of the peace," *Chaplinsky*, 315 U.S. at 572.

84. *Schenck v. United States*, 249 U.S. 47, 52 (1919); *accord* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

85. *See* *Beauharnais v. Illinois*, 343 U.S. 250, 256-57 (1952). The Supreme Court has accorded some constitutional protection to false defamatory statements made by the media. *See* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (states may not impose liability without fault for publisher or broadcaster of defamatory falsehood injurious to a private individual). The Court also gives substantial constitutional protection to false defamatory statements made about public officials. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (plaintiff must establish that defendant knew statement was false, or published it with reckless disregard as to its veracity); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155, 170, 172 (1966) (plurality opinion) (applying *New York Times* standard to statements made about public figures); Note, *Minnesota Defamation Law and the Constitution*, 3 WM. MITCHELL L. REV. 81 (1977). Neither *Gertz* nor any other Supreme Court decision expressly sets forth constitutional limitations on defamation actions brought by private persons against non-media defendants. Although some language in *Gertz* suggests that the *New York Times* "actual malice" standard applies to all defamation defendants, most courts that have faced the issue have held *Gertz* inapplicable to non-media defendants. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 257-58 & n.5 (Minn. 1980) (*Gertz*

infringe upon the common law right to privacy may also be regulated.⁸⁶

Some communication can be regulated because the manner in which it is produced necessarily causes harm. Thus, child pornography can be regulated because its production harms the physical and psychological well-being of the children used in making it.⁸⁷

The Supreme Court has to date permitted the regulation of only two types of speech based solely on their content: commercial speech⁸⁸ and obscenity.⁸⁹ Commercial speech receives partial constitutional protection, so that the right of the government to regulate it is limited.⁹⁰ Obscene material, on the other hand, receives

does not apply to non-media defendants in Minnesota; citing decisions of other jurisdictions).

86. See *Time, Inc. v. Hill*, 385 U.S. 374, 387-90 (1957). In *Hill*, the plaintiff brought a statutory action for false light privacy. See W. PROSSER & W.P. KEETON, LAW OF TORTS § 117, at 812-14 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON]; Note, *Tortious Invasion Of Privacy: Minnesota As A Model*, 4 WM. MITCHELL L. REV. 163 (1978) (evaluates and compares Prosser's approach to privacy with the socio-psychological concept of privacy). In *Hill*, the plaintiff alleged that a news story falsely reported that a play depicted his real life kidnapping. The Supreme Court overturned a jury award for plaintiff, holding that under *New York Times*, the plaintiff had to prove that the defendant published the story with knowledge of its falsity or reckless disregard as to its veracity. 385 U.S. at 387-88.

False light privacy is different from, but analogous to, common law defamation. Compare PROSSER & KEETON, *supra*, § 117, at 863-66 (discussing false light in the public eye) with §§ 111-116A (discussing common law defamation). Therefore, not surprisingly, the *Hill* Court applied a constitutional limitation on defamation actions to a false light privacy claim. *Hill* was decided at a time when the constitutional limitations on defamation were rapidly developing. See, e.g., *New York Times*, 376 U.S. at 279-80 (providing constitutional protection to statements about "public officials" absent actual malice); *Curtis Publishing Co.*, 388 U.S. at 155 (extending *New York Times* protection to "public figures"). Since that time, constitutional limits on defamation actions have been restricted. See *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 165-68 (1979) (restricting definition of "public figure"). Compare *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (plurality) (*New York Times* protection applies to any statement of public concern) with *Gertz*, 418 U.S. at 339-48 (*New York Times* standard does not apply to statements about private persons, though it relates to a matter of public concern). Consequently, the decision in *Hill* may no longer control in a false light privacy action brought by a private person.

87. *New York v. Ferber*, 458 U.S. 747, 756-58 (1982). Child pornography is not a content-based classification. Under *Ferber*, a film or photograph may pretend to portray sexual activity by minors, so long as minors are not used in making the film or photograph. *Id.* at 763.

88. See, e.g., *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

89. See *Roth v. United States*, 354 U.S. 476, 485 (1957).

90. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 571 (1980). In *Central Hudson Gas*, the Court set forth the constitutional limits to regulation of commercial speech. Commercial speech may be regulated if it promotes unlawful activity

no protection.⁹¹

or if it is misleading. *Id.* at 566. Even if it comes within first amendment protections, a state regulation is valid if: (i) "the asserted government interest is substantial" (ii) "the regulation directly advances the government interest asserted," and (iii) "it is not more extensive than is necessary to serve that interest." *Id.*

Constitutional protection for commercial speech has expanded considerably over the past 40 years. *Compare Valentine*, 316 U.S. at 54 ("the Constitution imposes no . . . restraint on government as respects purely commercial advertising") with *Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976) (voiding a state ban on the advertising of prescription drug prices). Nevertheless, states have more freedom to regulate commercial speech than they do to regulate other forms of protected speech. See *Central Hudson Gas*, 447 U.S. at 566 (state interest in regulating commercial speech need not be compelling, but merely substantial); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding state restriction on lawyers' in-person solicitation of clients); see also *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (striking down municipal ordinance limiting billboard use). The ordinance in *Metromedia* permitted on-site commercial advertising, but forbade other commercial advertising and noncommercial communication not covered by specified exceptions. *Id.* at 493-96. Seven of the Justices held that bans on some or all of the outdoor commercial advertising were permissible as a valid exercise of the police power. *Id.* at 541 (Stevens, J., dissenting in part), 568 (Burger, C.J., dissenting), 569 (Rehnquist, J., dissenting). The ordinance was struck down because six Justices felt it impermissibly restricted the use of billboards for noncommercial speech. *Id.* at 513-15, 528 (Brennan, J., concurring in judgment).

Commercial speech is also a content-based regulation. The pornography ordinance goes beyond the limits of the recognized commercial speech exception. Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas*, 447 U.S. at 561. Generally, commercial speech consists of advertisements for goods and services. The fact that someone has a financial interest in the communication does not make it commercial speech. The sole purpose of the communication must be to promote a financial interest in order for the communication to be commercial speech. See *id.* For instance, a paid political advertisement is not commercial speech. *New York Times*, 376 U.S. at 266. Nor are movies or books, though they are produced and sold for profit or for entertainment. *E.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (the fact that books, newspapers and magazines are sold for profit does not preclude the expression safeguarded by the first amendment).

The proposed ordinance would not affect speech related solely to economic interests though it can reach certain books and movies. Most economic advertisements are not sexually explicit as defined in the proposed ordinance and so are outside the scope of the pornography ordinance. See Proposed Ordinance § 3, to add MCO § 139.20(gg)(1).

91. *Miller v. California*, 413 U.S. 15, 23 (1973); *Roth*, 354 U.S. at 485. This categorization of unprotected communications into content-based and noncontent-based classifications is a simplified view of the recognized exceptions to the first amendment. For instance, although obscenity is a content-based exception, it has a contextual component. Material not otherwise obscene may be regulated if it is displayed to minors, *Ginsberg v. New York*, 390 U.S. 629 (1968), or if its prurient aspects are emphasized, *Ginzburg v. United States*, 383 U.S. 463, 471 (1966) (material was not obscene when distributed in therapeutic community, but was obscene when the advertiser "animated sensual detail to give the publication a salacious cast"). Conversely, the fighting words exception can be regarded as a content-based regulation. One can imagine some words that would not be likely to induce an immediate breach of the peace under any circumstances. Explanations in terms of factual content, veracity and context in this section are intended merely to

Consideration of the recognized exceptions aids in assessing the constitutionality of the proposed pornography ordinance. An examination of the state interests underlying some of the recognized exceptions indicates how the Court would regard the state interest underlying the ordinance. The state interest behind each of the recognized exceptions is in some way analogous to the state interest that is furthered by the MacKinnon/Dworkin pornography ordinance.

A. Pornography Distinguished From Obscenity

Obscenity is the exception that first comes to mind when considering the proposed ordinance. Pornographic materials have traditionally been treated under obscenity law.⁹² In discussing and debating the ordinance in Minneapolis, many people have assumed that the ordinance seeks to expand the obscenity definition. They have viewed it as an improved version of the obscenity laws, or proclaimed its unconstitutionality because it goes beyond the constitutional limitations of the obscenity exception.⁹³

Pornography, as defined in the ordinance, is not obscenity, though both are content-based regulations. The two concepts differ in various ways. In *Miller v. California*, the United States Supreme Court held that material is obscene if:

- (i) applying contemporary community standards, the material appeals to the prurient interest;
- (ii) it depicts sexual conduct in a patently offensive way; and,
- (iii) taken as a whole, it lacks serious literary, artistic, political, or scientific value.⁹⁴

The *Miller* obscenity definition permits regulation of material that is patently offensive, appeals to the prurient interest, and lacks serious social value.⁹⁵ While obscenity reaches "patently offensive" material,⁹⁶ only material that is "sexually explicit" can

highlight the primary factors affecting the constitutional protection afforded to various types of communication.

92. See generally, e.g., 18 U.S.C. § 1461 (1982) (federal obscenity statute); MINN. STAT. § 617.241 (1982) (Minnesota obscenity statute); MCO § 385.130 (1976) (Minneapolis obscenity ordinance).

93. For example, a memorandum from the Office of the Minneapolis City Attorney concluded that the ordinance was unconstitutional largely on the ground that it exceeded the constitutional limitations on the obscenity exception. Letter from David W. Gross, Assistant City Attorney, to Mayor Donald M. Fraser (March 27, 1984).

94. 413 U.S. 15, 24 (1973).

95. *Id.*

96. *Id.*

constitute pornography under the proposed ordinance.⁹⁷ Material that is not patently offensive or does not appeal to the prurient interest may nonetheless constitute pornography under the ordinance. Material that is not pornographic may be obscene, and vice versa.⁹⁸

The two concepts address entirely different state interests. They aim to prevent and remedy different harms. Obscenity regulation is aimed at preserving the social and moral order.⁹⁹ Obscenity is defined in terms of prurience and offensiveness.¹⁰⁰ By considering

97. Proposed Ordinance § 3, to add MCO § 139.20(gg)(1).

98. The obscenity definition is written in flexible, subjective terms. Its scope depends on contemporary standards. Virtually any writing or other depiction could be obscene at different times in different communities. Given this flexibility, it may be overly simplistic to say that the pornography definition is broader than the obscenity definition. The conclusion here that the pornography definition will reach non-obscene materials means only that certain material is not within the present scope of the obscenity definition.

Some material that would be ruled obscene would not be covered by the definition of pornography contained in the ordinance. To this extent, the pornography definition is narrower than the obscenity definition. Under the *Miller* standard, material that is not sexually explicit and does not subordinate women may be obscene. For purposes of the analysis in this section, it is important only that the pornography definition is broader than the obscenity definition in some respects. See generally *infra* notes 191-93 and accompanying text (comparison of pornography and obscenity definitions under the vagueness doctrine).

99. *E.g.*, *Roth v. United States*, 354 U.S. 476, 485 (1957) (regulation of obscenity furthers the social interest in order and morality); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (social interest in morality and order outweighs any need for constitutional protection of lewd and obscene materials). Despite the large volume of court decisions on obscenity, the Court has failed to pinpoint the state interest involved; nor has it referred to that state interest as compelling. The Court has stated that obscenity is "utterly without redeeming social importance," *Roth*, 354 U.S. at 484, and that it does "not have serious literary, artistic, political, or scientific value," *Miller*, 413 U.S. at 24. This reasoning illustrates that the Court may recognize an exception to the first amendment absent a compelling state interest. This is a true balancing test: the lower the social value of the communication, the less important must be the state interest required to allow its regulation. Thus, political speech can be regulated only if there is a compelling state interest, while obscenity can be regulated even absent an identified or identifiable compelling state interest.

The ordinance furthers an important state interest by regulating communication that has little or no social value. The focus of this paper is on the compelling nature of the state interest in regulating pornography. Regardless of the social value of pornography, the compelling nature of the state interest is probably sufficient to justify regulation of it.

The Court has noted that at least certain pornographic material possesses only minimal social value. See *Roth*, 354 U.S. at 484 (obscenity); *Ferber*, 458 U.S. 747 (child pornography, whether or not obscene); see also *Young*, 427 U.S. at 61 ("there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance"). It is the author's view that other forms of pornography possess no more social value than the forms that have been addressed by the Court in these cases.

100. See *Miller*, 413 U.S. at 24 (1973).

offensiveness, the definition classifies material on the basis of taste. By considering prurient interest, it looks to arousal of the male audience.¹⁰¹

The pornography ordinance looks to the harm caused by pornographic material. The definition of pornography includes only material that subordinates women.¹⁰² The statement of findings contained in the ordinance asserts that pornography is "a systematic practice of exploitation and subordination based on sex."¹⁰³ The stated purpose of the ordinance is to prohibit this exploitation and subordination.¹⁰⁴ The ordinance thus seeks to protect a state interest and regulate a class of communication not reached by obscenity law.¹⁰⁵

B. *Pornography and Defamation*

The harms addressed by the ordinance and defamation law are similar. The communication regulated by both possesses less intrinsic value than communication which is afforded full constitutional protection.

Defamation causes harm to reputation.¹⁰⁶ This is a form of psychological harm. Defamation law protects a person's right to fend off personal attacks on his or her good name and allows him or her to set the record straight by correcting the defamatory imputations.¹⁰⁷ Defamation law protects against these harms by regulating a class of communication that possesses minimal social value.¹⁰⁸ False statements have no place in the free exchange of ideas: they contribute nothing to any meaningful discussion.¹⁰⁹

False defamatory statements are generally outside the scope of

101. The question whether something appeals to the prurient interest is a question of constitutional fact, subject to de novo review by an appellate court. *See Miller*, 413 U.S. at 25; *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1961-63 (1984) (Supreme Court may conduct independent factual review of record to determine whether speech in question falls within unprotected category).

102. Proposed Ordinance § 3, to add MCO § 139.20(gg)(1).

103. *Id.* § 1, to add MCO § 139.10(a)(1).

104. *Id.* § 1, to amend MCO § 139.10(b)(4).

105. *See supra* notes 99-104 and accompanying text.

106. PROSSER & KEETON, *supra* note 86, § 111, at 771.

107. *See L. TRIBE, AMERICAN CONSTITUTIONAL LAW* § 12-12, at 631 (1978) ("the defamatory statement was not speech for which 'more speech' was an adequate remedy: experience had shown that the truth rarely catches up with the lie").

108. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), *cited with approval in Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

109. *Gertz*, 418 U.S. at 340.

the first amendment.¹¹⁰ Defamatory statements made about public officials and public figures, however, receive partial constitutional protection.¹¹¹ This protection is deemed necessary to avoid a chilling effect on truthful statements.¹¹²

The potential for harm characteristic of defamation is also characteristic of pornography. Pornography, like defamation, causes psychological harm. It taints the self-image of women. It creates an atmosphere of violence that stifles the full exercise of women's civil rights.¹¹³ It sexualizes women and women's activities, thus subjecting them to institutionalized harassment and objectification.¹¹⁴

Pornography also lacks serious social value. Like false defamatory statements, it adds little or nothing to the marketplace of ideas.¹¹⁵ It does not pretend to further our knowledge or appreciation of the real world. Like false statements, pornography seeks to create its own reality. Unlike the regulation of defamatory statements, however, the regulation of pornography does not pose a serious danger of chilling truthful or otherwise valuable dialogue.¹¹⁶

Under the common law rule, a plaintiff could recover damages for defamation upon a showing that the defendant made a false defamatory statement about him to a third person.¹¹⁷ For libel and certain forms of slander one could recover damages without

110. *Beauharnais v. Illinois*, 343 U.S. 250, 256-57 (1952). "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that is derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 256-57; *see also* *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Gertz*, 418 U.S. 323; *supra* note 85 and accompanying text.

111. *See supra* note 85.

112. *See Gertz*, 418 U.S. at 340; *New York Times*, 376 U.S. at 279.

113. *See supra* notes 81-82 and accompanying text.

114. *See supra* note 80.

115. Justice Holmes wrote "The best test of truth is the power of the thought to get itself accepted in the competition of the market" *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

116. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976). In *Young*, the Court stated:

[W]e are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First Amendment . . . [T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance.

Id. at 60-61.

117. PROSSER & KEETON, *supra* note 86, § 113, at 797. Under the common law rule, truth was an affirmative defense which the defendant was required to plead and prove. *Id.* § 116, at 798.

any proof of pecuniary loss.¹¹⁸

Under the current common law rule, a statement must refer to a particular person in order to be considered defamatory.¹¹⁹ It is therefore unlikely that a court would treat pornographic material as false defamatory speech. While there is Supreme Court precedent for a cause of action for "group libel," modern developments in defamation law have rendered the concept constitutionally suspect.¹²⁰

The state interest in regulating pornography is greater than the interest in regulating defamation. States are permitted to regulate defamation to remedy and deter the harm that is caused by individual defamatory statements. The MacKinnon/Dworkin ordinance addresses a harm that is thematic and more pervasive. The ordinance seeks to remedy a harm caused by statements that are all saying the same thing. Pornography is symphonic defamation.

C. *Pornography and the Clear and Present Danger Doctrine*

The Supreme Court has denied constitutional protection to speech that constitutes a clear and present danger of imminent lawless action.¹²¹ This doctrine arose in the context of communication that threatened the national security¹²² and created a danger of imminent harm.¹²³ Its application has continued to be limited to communication that allegedly threatens the national interest.¹²⁴ The fighting words exception, which permits regulation of communication that by its nature creates a threat of imminent

118. *Id.* § 112, at 785-86. Slanderous statements are actionable in most jurisdictions without proof of actual damages if they impute a crime, a loathsome disease, or sexual impropriety, or if they affect the plaintiff in his or her occupation or business. *Id.* § 112, at 788-93.

119. PROSSER & KEETON, *supra* note 86, § 111, at 778. Corporations and other entities can bring actions for defamation in certain situations. *Id.* § 111, at 779-80.

120. *See Beauharnais*, 343 U.S. 250. The *Beauharnais* Court upheld a conviction under an Illinois group libel law of a defendant who distributed racist literature. *Id.* at 267. Though *Beauharnais* has never been directly overruled, the development of defamation law since that time makes the ruling constitutionally questionable. *See generally* NOWAK, *supra* note 47, at 943-44.

121. *See Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

122. *See Abrams*, 250 U.S. at 627-28 (Holmes, J., dissenting); *Schenck*, 249 U.S. at 52-53.

123. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842-43 (1978) ("[T]he test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterances and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression").

124. *See, e.g., Scales v. United States*, 367 U.S. 203, 251 (1961) (Communist Party instruction to Blacks to gain power by overthrowing the United States government).

violence,¹²⁵ is a variant of the clear and present danger doctrine.¹²⁶

Both of these exceptions are based on the notion that certain statements pose a serious and imminent danger of harm, and that this harm cannot be averted by discussion or education.¹²⁷ In this context, the communication has "all the effect of force"¹²⁸ and loses its character as protected speech.¹²⁹ The harm of these regulable words is analogous to the harm of pornography. Empirical data points to the conclusion that pornography contributes to violence against women.¹³⁰ Like fighting words and words that create a clear and present danger, pornography raises a spectre of violence not associated with protected speech.

The central concern of the clear and present danger exception is

125. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The *Chaplinsky* Court wrote "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* (footnote omitted).

126. Together, the doctrines apply to two extremes of violence. The clear and present danger doctrine is directed at national harm, while the fighting words doctrine is directed at harm to individuals. The author is unaware of any Supreme Court decision where these or related doctrines have been applied to permit the regulation of communications that posed an imminent danger to a distinct population group. Nonetheless, there appears to be no principled reason why the clear and present danger/fighting words rationale could not be applied to communication that poses an imminent threat of danger to an identifiable class of people. *Cf.* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (Ku Klux Klan leader's threatening statements about Blacks and Jews constitutionally protected because statements raised no imminent threat of violence or lawlessness). Pornography could conceivably be subject to this rationale because it poses an imminent threat of danger to women as a class.

127. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring), *rev'd*, 395 U.S. 444 (1969); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). "[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion." *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

Justices Holmes and Brandeis were the architects of the clear and present danger doctrine. It is their view, and not the majority opinions in *Whitney* and *Abrams*, that underlies the present dimensions of the doctrine. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Herndon v. Lowry*, 301 U.S. 242 (1937).

128. *Schenck*, 249 U.S. at 52.

129. In discussing the fighting words doctrine, one set of commentators averred that:

[I]t is the better analysis to regard fighting words as within the ambit of action rather than speech as there is no intellectual content to be conveyed to the listener, but merely a provocative, emotional message The theory of the regulation of 'fighting words' is not contrary to the theory of the free marketplace of ideas because this speech triggers an automatic reaction, with no thinking, rather than a consideration of an idea.

NOWAK, *supra* note 47, at 954. Consider whether pornography possesses "intellectual content," or "triggers an automatic reaction."

130. *See supra* notes 75-78 and accompanying text.

to prevent harm, fueled by communication, that could not be averted by discussion and the free flow of ideas.¹³¹ Like speech that is a clear and present danger, the harms of pornography cannot be averted by the free flow of ideas. Pornography eroticizes women and women's actions.¹³² It alters society's attitudes and behavior toward women.¹³³ Though the harm of pornography is not imminent as required by the clear and present danger test,¹³⁴ pornography poses a serious and pervasive danger analogous to that sought to be precluded under the clear and present danger exception.

D. Pornography and Child Pornography

The pornography ordinance is also analogous to the recently recognized child pornography exception to the first amendment. In the 1982 decision of *New York v. Ferber*,¹³⁵ the Supreme Court upheld a New York law prohibiting the distribution of child pornography.¹³⁶ In *Ferber*, the Court recognized the harm that may be suffered by those involved in the production of pornography.

The Court's ruling was based on the rationale that children used

131. See *Watts v. United States*, 394 U.S. 705, 708 (1969) (conviction for threatening to kill the President overturned where no actual threat of a future harm existed); *Whitney*, 274 U.S. at 375-77 (Brandeis, J., concurring); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

132. See *supra* notes 62-70 and accompanying text.

133. *Id.*

134. See *supra* notes 121-24 and accompanying text.

135. 458 U.S. 747 (1982).

136. In *Ferber*, the defendant, the proprietor of an adult bookstore, was convicted of promoting "any [sexual] performance or part thereof which includes sexual conduct by a child less than sixteen years of age." NEW YORK PENAL LAW § 263.00(1) (McKinney 1980) (quoted in *Ferber*, 458 U.S. at 751). Sexual conduct under the statute was defined as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." NEW YORK PENAL LAW § 263.00(3) (McKinney 1980) (quoted in *Ferber*, 458 U.S. at 751). The statute made no distinction between violent and nonviolent pornography.

The statute at issue in *Ferber* set the age of majority at 16. On May 21, 1984, Congress amended a child pornography law similar to the New York law upheld in *Ferber*, extending it to performers under the age of 18. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (to be codified at 18 U.S.C. § 2251-54). In light of the widespread treatment of the 18th birthday as the date of majority in a wide variety of contexts, see, e.g., U.S. CONST. amend. XXVI, § 1 (granting 18-year-olds the right to vote), the amended federal law would most likely be sustained for the reasons stated in *Ferber*. Quaere whether the Court would uphold a child pornography law setting the age of majority at 21. This age is also associated with the acquisition of various rights reserved for adulthood such as the right to purchase alcoholic beverages. Such a law, if sustained, would further limit the pool of female and male performers available for the production of pornography.

in the production of pornography are hurt by it.¹³⁷ The use of children was found to be injurious to their physical, emotional, and mental health.¹³⁸ The Court stated that child pornography is "intrinsically related to the sexual abuse of children."¹³⁹ The prohibition on the sale of child pornography was upheld as necessary to eliminate the economic incentive for its production.¹⁴⁰

The *Ferber* case was limited to child pornography. The decision did not discuss or acknowledge the harm of pornography to adult participants. The Court did hint that such harm would be of lesser concern.¹⁴¹ It may, therefore, appear easy to dismiss *Ferber* as inapplicable to pornography that does not involve the use of minors. The Court's reasons for carving out a child pornography exception to the first amendment, however, do apply to permitting state regulation of all pornography.

The Court found that child pornography is intrinsically related to the sexual abuse of children in two ways. First, the pornographic material constituted a permanent record of the child's participation which could harm the child in future years.¹⁴² This concern is equally applicable to adult women. Adults, like minors, may be anguished by the knowledge that people are buying, selling, and viewing displays of their bodies.¹⁴³

Second, the production of pornography "requires the sexual exploitation of children."¹⁴⁴ It is unclear whether the Court saw child pornography as exploitive because participation in pornogra-

137. The New York statute was the first law ever considered by the Court that sought to regulate pornographic material on the basis of the psychological and physiological harm it caused. The Court held that the *Miller* obscenity standard was inadequate to address the harm. *Ferber*, 458 U.S. at 761.

138. *Id.* at 758. It is noteworthy that the Court based its conclusion that pornography caused this harm on scientific studies. *Id.* at 758 n.9 (collecting scientific authorities).

139. *Id.* at 759.

140. *Id.* at 761-62.

141. The Court noted that safeguarding the health of children was a matter of special concern to the state. *Id.* at 756-57. The Court also noted that if the material being produced were "necessary" for literary or artistic purposes, a person over the age of minority could be used. *Id.* at 763.

The recognition of a special state interest in protecting children is consistent with other decisions of the Court. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (FCC may prohibit broadcast of "seven dirty words" at time of day when minors are likely to be listening); *Ginsberg v. New York*, 390 U.S. 629 (1968) (state may prohibit sale of non-obscene material to minors).

142. *Ferber*, 458 U.S. at 759 & n.10.

143. Women testified at the Minneapolis hearings to the harm they are suffering. *See Hearings, supra* note 66.

144. *Ferber*, 458 U.S. at 759.

phy is inherently exploitive, or because nonconsensual involvement in pornography is exploitive. If the former, this reason is equally applicable to adult women involved in pornography. If the latter, it is at least applicable to adult women who have been forced or coerced into the production of pornography.¹⁴⁵

Aside from the age limitation on the child pornography statute in *Ferber*, the definition of pornography contained in the ordinance is arguably narrower than the definition of illegal activity in *Ferber*.¹⁴⁶ The ordinance seeks to protect several state interests and is not limited to the state's concern for minors.¹⁴⁷ Though the many differences between the proposed pornography ordinance and child pornography make any precise comparison impossible, *Ferber* evidences the Court's willingness to accord great weight to pornography's harm to participants.

VI. THE PROPOSED ORDINANCE AND OVERBREADTH AND VAGUENESS

The previous section discussed the proposed pornography ordinance as a content-based regulation. The regulability of pornography is, however, only one of the constitutional hurdles that must be overcome. An otherwise valid regulation of communication is void if it reaches beyond its permissible scope or if it is unduly vague.

A. The Overbreadth Doctrine

The overbreadth doctrine requires that laws regulating unprotected communication not also impinge on areas of protected speech.¹⁴⁸ A law that goes beyond the boundary separating protected from unprotected speech violates the doctrine and is unconstitutional.¹⁴⁹ The purpose of the doctrine is to avoid undue self-

145. The Court never discussed the question whether minors involved in pornography are in it of their own volition. One seeking to limit the applicability of *Ferber* to minors could assert that minors, by virtue of their tender years, are incapable of giving meaningful consent to participation in pornography.

146. The *Ferber* statute prohibited the depiction of various acts and postures, regardless of whether they subordinated the children involved. Many types of depictions that would fall within the New York statute in *Ferber* would not be covered by any of the nine depictions enumerated in the pornography ordinance.

147. See *supra* notes 59-82 and accompanying text.

148. *Village of Schaumburg v. Citizens For a Better Env't*, 444 U.S. 620, 634 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977); *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

149. See *Schaumburg*, 444 U.S. at 634-35; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940)

restraint by people in the exercise of their first amendment rights.¹⁵⁰ To diminish this chilling effect, even one whose actions are clearly unprotected by the Constitution may challenge the statute being applied as overbroad.¹⁵¹ Every statute that regulates communication is likely to impinge to some degree on protected speech.¹⁵² For this reason the law is void only if the overbreadth is substantial.¹⁵³

There are two ways in which the issue of overbreadth may arise. First, a court may find that the government has a compelling state interest in regulating some, but not all, of the material covered by the ordinance. For instance, a court may find that the city of Minneapolis has an important interest sufficient to justify regulation of material that depicts women "as sexual objects who experience sexual pleasure in being raped,"¹⁵⁴ but not to justify regulation of material that depicts women "dehumanized as sexual objects, things or commodities."¹⁵⁵

(invalidating a law "which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech").

150. *Ferber*, 458 U.S. at 768 (quoting *Schaumburg*, 444 U.S. at 634); see also *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting) (the overbroad statute at issue "hangs over their heads like a sword of Damocles"). The overbreadth doctrine is limited to first amendment rights. See *Bates*, 433 U.S. at 380; *Moose Lodge v. Irvis*, 407 U.S. 163, 168 (1972).

151. *Ferber*, 458 U.S. at 769; *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965).

152. See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 859 n.61 (1970). The Supreme Court stated that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

153. *Ferber*, 458 U.S. at 769; *Parker v. Levy*, 417 U.S. 733, 760 (1974) (invalidation is inappropriate where there are only "marginal applications in which a statute would infringe on first amendment values").

The overbreadth must be particularly substantial where the law regulates expressive conduct rather than pure expression. *Broadrick*, 413 U.S. at 615, cited with approval in *Ferber*, 458 U.S. at 770; see also *Parker*, 417 U.S. at 760. Consider whether pornography is pure expression, or whether it lies somewhere further along the speech-conduct continuum. The rape of a woman is clearly conduct. On the other hand, standing on a soapbox in downtown Minneapolis and discussing the merits of raping women is pure expression. Pornography lies somewhere between these two extremes.

Pornographic material is expressive, communicating that women should be treated in certain ways and that women enjoy being treated in those ways. It also has a conduct aspect. Real women, some against their will, pose for and act out the view of the world that pornography espouses. For purposes of overbreadth analysis, the important point is that pornography is less benign than, and should be distinguished from, pure expression.

154. Proposed Ordinance § 3, to add MCO § 139.20(gg)(1)(iii).

155. *Id.* § 3, to add MCO § 139.20(gg)(1)(i). As noted *supra* at note 8, a modified version of the MacKinnon/Dworkin proposed ordinance was adopted in Indianapolis. On

Second, the issue of overbreadth may arise if the actual scope of the ordinance arguably exceeds its intended purpose. This is likely to arise, if at all, in the argument that the ordinance might reach great literature or great works of art. The constitutional issue is whether the proposed ordinance is substantially overbroad.¹⁵⁶ It is impossible to answer this question without knowing how the court would interpret the definition in the ordinance and the state interest involved.¹⁵⁷ A probable result may be suggested, however, by the Court's decision in *New York v. Ferber*.¹⁵⁸

After recognizing child pornography as a new exception to the first amendment,¹⁵⁹ the *Ferber* Court considered an overbreadth challenge to the New York child pornography statute.¹⁶⁰ The lower court held that the statute was overbroad because it would prohibit the sale of medical and educational materials containing photographs of minors performing the specified sexual acts.¹⁶¹ The Supreme Court acknowledged that the statute would reach "some protected expression, ranging from medical textbooks to pictorials in the National Geographic"¹⁶² These instances, however, would amount to only "a tiny fraction of the materials within the statute's reach."¹⁶³ According to the Court, the statute's "legitimate reach dwarfs its arguably impermissible applications."¹⁶⁴ Those impermissible applications could be "cured through case-by-case analysis,"¹⁶⁵ and did not render the statute impermissibly overbroad.¹⁶⁶ Following this reasoning, it is likely,

May 1, the American Booksellers Association and nine other named plaintiffs filed suit in federal court seeking a declaratory judgment that the ordinance is unconstitutional. See Plaintiff's Second Amended Complaint, *American Booksellers Ass'n v. Hudnut*, No. IP 84-791C (S.D. Ind. 1984) (on file at the William Mitchell Law Review office). There was no claim that the ordinance was only unconstitutional in part. The Minnesota Civil Liberties Union has taken the same position with regard to the Minneapolis ordinance. See Ojala, *The Minneapolis Pornography Ordinance—Censorship Not Civil Rights*, HENNEPIN LAW., Mar.-Apr. 1984, at 10.

156. See *supra* notes 152-53 and accompanying text.

157. See *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974) (patently offensive element of the obscenity definition construed not to reach depictions contained in the film *Carnal Knowledge*). The proposed ordinance may require lawyers and laypersons alike to reassess the criteria by which something is labeled "literature" or "art."

158. 458 U.S. 747 (1982).

159. *Id.* at 765. See *supra* notes 135-47 and accompanying text.

160. *Id.* at 766.

161. *Id.*

162. *Id.* at 773.

163. *Id.*

164. *Id.*

165. *Id.* at 774.

166. *Id.* at 773.

though not certain, that the ordinance would withstand such a challenge and be held not substantially overbroad.

B. The Vagueness Doctrine

The vagueness doctrine imposes a requirement of specificity on legislation. Due process requires that a law provide persons with fair notice of what they may and may not do.¹⁶⁷ The terms of the law must convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."¹⁶⁸ A statute that is worded so that persons "of common intelligence must necessarily guess at its meaning and differ as to its application" is void for vagueness.¹⁶⁹ Like the overbreadth doctrine, the vagueness doctrine is intended to avert self-censorship.¹⁷⁰ Statutes must be sufficiently specific to assure that people are not required to forego exercise of a constitutional right to ensure avoidance of the statute's sanctions.¹⁷¹ The language of the statute must permit a person of ordinary common sense to understand it and comply with it.¹⁷² An otherwise vague statute will be valid,

167. *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972). A law must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *Id.* at 162 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)); accord *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (voiding criminal statute prohibiting "gang" membership because "all are entitled to be informed as to what the State commands or forbids"); see also Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

The vagueness doctrine is a requirement grounded in the due process clause of the fifth and fourteenth amendments. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Jordan v. De George*, 341 U.S. 223, 230 (1951); *Connally v. General Construction Co.*, 269 U.S. 385, 390 (1926).

168. *Roth v. United States*, 354 U.S. 476, 491 (1957), quoting *United States v. Petrillo*, 332 U.S. 1, 8 (1947); *Lanzetta*, 306 U.S. at 453.

169. *Connally*, 269 U.S. at 391; cf. *Miller v. California*, 413 U.S. 15, 26 n.9 (1973) (a defendant's constitutional rights are not abridged though jurors may reach different results in applying a law to the facts).

170. See *Grayned*, 408 U.S. at 109; *Baggett v. Bullitt*, 377 U.S. 360, 372 (vague language requires one "to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked") (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

171. See *Grayned*, 408 U.S. at 109; *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961).

172. Unlike the overbreadth doctrine, the vagueness doctrine also applies beyond the first amendment area. See, e.g., *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36-37 (1963) (statute prohibiting certain unfair business practices upheld against vagueness challenge); *Neblett v. Carpenter*, 305 U.S. 297, 303 (1938) (statute providing for rehabilitation of insolvent insurance companies upheld against vagueness challenge). The constitutional standard for specificity is not stated any differently for first amendment cases than for other cases. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-28, at 719 (1978). As a practical matter, however, the Court will require greater precision in

however, if judicial interpretation of its terms makes it more specific.¹⁷³ The Supreme Court will look beyond the four corners of the statute when assessing its clarity and will also consider judicial decisions interpreting it.¹⁷⁴

If the proposed ordinance is enacted, it is almost certain that its definition of pornography¹⁷⁵ will be subjected to a vagueness challenge.¹⁷⁶ Each of the four elements of the definition would be scrutinized for vagueness. In the first element of pornography, for instance, the operative word is "graphically."¹⁷⁷ The scope of the graphically depicted element is limited by the ordinary usage of its terms. A graphic depiction is "vividly descriptive, life-like"¹⁷⁸ or "marked by clear and lively description or striking imaginative power."¹⁷⁹ A writing is graphic when it "produc[es] . . . by words the effect of a picture."¹⁸⁰ Using a definitional approach, therefore, the first element limits the scope of the ordinance to detailed depictions.

The second element, that the material be sexually explicit,¹⁸¹ requires sexual content in the material. The sexually explicit element contains an element of ambiguity. On the one hand, it could mean the explicit display of sexual body parts: the crotch, buttocks and breasts. The Minneapolis Task Force on Pornography

laws arguably touching upon first amendment guarantees. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Hynes v. Oradell*, 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review of laws dealing with speech"). Compare *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (statute requiring motor carriers to avoid congested routes upheld against vagueness challenge) with *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (prohibition on treating American flag contemptuously held void for vagueness).

173. *Hoffman Estates*, 455 U.S. at 494 n.5. This rule of law is illustrated in *Hamling v. United States*, 418 U.S. 87 (1974), in which the Court upheld a federal obscenity statute, 18 U.S.C. § 1461 (1982), that prohibits the use of the mails to convey any "obscene, lewd, lascivious, indecent, filthy or vile article," by reading the *Miller* requirements into the statute. 418 U.S. at 116.

174. See, e.g., *Ward v. Illinois*, 431 U.S. 767, 774 (1977) (vague obscenity law saved by state judicial construction).

175. Proposed Ordinance § 3, to add MCO § 139.20(gg).

176. In the pending case in Indianapolis of *American Booksellers Ass'n v. Hudnut*, discussed *supra* note 155, the plaintiff alleged, inter alia, that the civil rights ordinance was vague and overbroad. Plaintiff's Second Amended Complaint at 1, *American Booksellers Ass'n v. Hudnut*, No. IP 84-791C (S.D. Ind. 1984) (on file at the William Mitchell Law Review office).

177. Proposed Ordinance § 3, to add MCO § 139.20(gg)(1).

178. 4 OXFORD ENGLISH DICTIONARY 359 (1933).

179. WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 990 (1976).

180. 4 OXFORD ENGLISH DICTIONARY 359 (1933).

181. Proposed Amendment § 3, to add MCO § 139.20(gg)(1).

defined this element in those terms.¹⁸² On the other hand, it could encompass explicit depictions of sexual activity.¹⁸³ It would be helpful, for constitutional purposes, if a legislative body adopting this or a similar ordinance would define the term one way or the other. The absence of a statutory definition, however, will not render a term unconstitutionally vague. As noted above, application of the vagueness doctrine requires consideration of judicial interpretations of the otherwise vague terms.¹⁸⁴

The third element of pornography, "subordination of women,"¹⁸⁵ may be the most problematic. Much of the difficulty with the term stems from the novelty of its use in the law, at least in the first amendment context. The subordination element incorporates the harm of pornography into the definition of pornography.¹⁸⁶ The harm of pornography is that it contributes to the inferior status of women. The Minneapolis Task Force on Pornography captured the essence of this harm when it defined subordination as "the treatment of another as inferior, submissive to, or controlled by another; made subject or subservient to another."¹⁸⁷ For example, a depiction of a woman that signified her unconditional sexual availability to the viewer, or the exhibition of her as a sexual slave for all who desired her, would constitute subordination.

Even if the Task Force definition were written into the proposed ordinance, a court might still hold the term unduly vague. Understanding the term requires an understanding of the harm which the term addresses.¹⁸⁸ The validity of the ordinance in the face of a vagueness challenge will thus depend to some degree on the court's understanding of the harm that pornography causes.

The final element of the pornography definition consists of nine

182. See *supra* note 28.

183. *Id.*

184. Adoption by a court of one interpretation or the other would likely provide the term with the required specificity. Even absent a judicial interpretation, the term may be sufficiently specific. For instance, the "body parts" meaning is subsumed within the broader "sexual activity" meaning. As such, any judicial consideration of the term would be not so much a matter of interpretation as of limitation. The broader definition itself is probably sufficiently objective and clear to survive scrutiny. For a further discussion of the sexually explicit element, see *infra* note 193 and accompanying text.

185. Proposed Ordinance § 3, to add MCO § 139.20(gg)(1).

186. As noted *supra* notes 66-69 and accompanying text, pornography is the subordination of women through sexuality.

187. See *supra* note 28.

188. For a discussion of the harms caused by pornography, see *supra* notes 59-80 and accompanying text.

particular types of depictions, one of which must be met in order for the material to be classified as pornography. As the nine provisions are independent and written in the disjunctive, a court may void one or more of them without voiding the entire definition.¹⁸⁹

An assessment of the likely outcome of a vagueness challenge can best be made by considering the degree of specificity the court requires in other first amendment contexts. The closest analogy for this purpose is the court's definition of obscenity.¹⁹⁰

Constitutional protection for material challenged as obscene turns on notions of prurient interest, patent offensiveness, and serious value.¹⁹¹ These are elusive measures. Moreover, by injecting the notion of contemporary community standards into the definition, the degree of constitutional protection is made dependent on the time and place of the communication.¹⁹²

The serious social value element of the obscenity definition is the only element that focuses on the material, rather than on the viewer's response to it. Thus, despite the relative nature of the term "serious," it is the least vague element in the definition.

The sexually explicit element of the pornography definition is analogous to the prurient interest element of obscenity, in that both focus on the sexual tenor of the material. The similarity ends there, however. The prurient interest element looks to the arousal of the viewer, typically male. As prurient interest is a question of constitutional fact subject to independent review by an appellate court,¹⁹³ this requirement will be satisfied only if the material is capable of arousing both the jury and the reviewing judge.

The sexually explicit element does not incorporate an effect-oriented, subjective approach. The focus is on the depiction, not how people will react to it. This focus provides a more objective crite-

189. The proposed ordinance contains a severability clause, which provides that "should any part(s) of this ordinance be found legally invalid, the remaining part(s) remain valid." Proposed Amendment § 4, to add MCO § 139.40(q).

190. See *Miller*, 413 U.S. at 24 (definition of obscenity).

191. *Id.*

192. A state may define the community as it sees fit. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); see, e.g., MINN. STAT. § 617.241, subd. 1(c) (Supp. 1983) (defining community as "the political subdivision from which persons properly qualified to serve as jurors in a civil proceeding are chosen"). As the community standards to be applied are contemporary ones, the determination of whether a certain piece of material is obscene may change with time. See also Allen, *Community standard sought for enforcing obscenity ordinance*, Minneapolis Star & Trib., Aug. 3, 1984, at 1B, col. 1.

193. See *Miller*, 413 U.S. at 25; accord *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1963 (1984).

tion for the trier of fact. It also makes it easier for would-be producers, distributors, and sellers of pornography to adjust their conduct to avoid liability under the ordinance.

The subordination element of pornography is analogous to the patently offensive element of obscenity, as both incorporate the state interest into the respective definitions. Like the prurient interest element, the patently offensive element looks to the viewer's reaction to the material, not to the material itself. Offensiveness, like prurient appeal, is an inherently subjective judgment depending on the viewer's visceral reaction to the matter, not on a reasoned assessment of the material. The subordination requirement of pornography is an objective criterion. It requires examination of the woman in relation to others in the depiction or to the reasonable viewer. The question of subordination can thus be reasonably answered at the time the material is first produced or distributed. The terms of the pornography definition thus provide clearer notice than the terms of the obscenity definition that certain materials do or do not come within the terms of the law.

VII. CONCLUSION

The MacKinnon/Dworkin proposed ordinance presents a creative, thoughtful, and novel approach to the regulation of pornography. It is the first law that has defined pornographic material in terms of the many harms that it causes. As a regulation of communication that has presumptively been accorded constitutional protection, the proposed ordinance will present the courts with several challenging first amendment issues.

Since the proposed ordinance is a unique approach to pornography, the outcome of a constitutional challenge is difficult to predict. Nevertheless, Supreme Court decisions in other areas of first amendment jurisprudence provide guidance in answering this question. The constitutionality of a regulation of communication hinges on the substantiality of the state interest being protected. The ordinance addresses several harms of pornography. These harms are a part of women's everyday lives and our social fabric. The existence and extent of these harms are confirmed by a growing body of empirical data.

The precise state interests involved here have never been squarely presented to the Court. The Court has, however, adjudicated cases involving similar or analogous harms. It has ruled that the harms to be averted by defamation law, the clear and present

danger doctrine, and child pornography statutes are sufficient to permit regulation of those classes of communication. The harms of pornography are equal to or greater than the harms addressed by these three types of communication. The MacKinnon/Dworkin proposed ordinance is to date the most effective and comprehensive approach to combatting the harm of pornography.